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JERRY L. COLCLAZIER

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VIA ELECTRONIC MAIL ONLY

April 5, 2021

Brad Clark, General Counsel
Oklahoma Department of Education

Dear Mr. Clark:

I am writing in response to your email correspondence to Mannix Barnes, Superintendent of Western Heights, dated March 30, 2021. Not surprisingly, Superintendent Barnes and the District are very concerned over the allegations contained in your email, especially your statement that the OSDE has already made a "determination that the District has failed to comply with Oklahoma laws and regulations", before Western Heights had any notice of these allegations, apparently before the Department has started an investigation, and importantly, before the District was provided any notice or other due process, or a fair administrative hearing.

Regardless, the Superintendent and the District want to fully cooperate in any investigation conducted by the OSDE. However, I have several concerns about this proceeding. First, I am concerned as to the authority of the OSDE to compel these citizens to appear before the State Board. Can you identify the legal authority of the State Board to subpoena or otherwise compel board members or employees of the District? You indicate in your letter that the State Board has already determined that the District, and assumably these individuals, have failed to comply with Oklahoma laws and regulations. Are you alleging criminal violations? If so, which ones? Secondly, in order to fully cooperate, the District needs to fully understand the basis and details of the allegations, as well as the authors of the "numerous complaints", so that the District can be prepared to offer a complete defense and fully respond to your concerns. Both our criminal and civil justice systems are premised on full notice of the allegations, *before* being required to appear and testify. Consequently, I am advising the District that it would be improvident for the School Board President, Ms. Farley and Superintendent Barnes to appear before the State Board before being fully advised as to the basis, legal authority, and complete details of these allegations.

For this reason, the District requests the following specifics and documentation, prior to any appearance before the State Board.

1. Please provide copies of any and all of the "numerous complaints", as well as any correspondence between any employees or agents of the OSDE; and
2. For each of the eight (8) listed allegations, please identify the specific law, regulation, or accreditation standard that the OSDE and/or the accuser alleges was violated; and
3. For each of the eight (8) listed allegations, please identify the factual basis, including the identification of any witnesses who have provided testimony or support for the allegations, as well as produce any and all documents which the OSDE is relying upon, or has relied upon, to reach its conclusion that the District failed to comply with Oklahoma laws and regulations. This would include any and all documents, reports, presentations, etc., that the Board reviewed in executive session on March 25, 2021; and
4. Please identify specifically what action the District must take within ninety (90) days in order to "come into compliance with the laws, regulations and standards"; and
5. Please provide the statutory authority for the OSDE to revoke the accreditation of the District without providing a hearing pursuant to the Oklahoma Administrative Procedures Act, Title 75 O.S. §250 *et seq.*

If you refuse to provide this basic information based on the concept of fairness and full disclosure, please consider this request as submitted pursuant to the Oklahoma Open Records Act, Title 51. O.S. §24A.1 *et seq.* If you intend to proceed with any adjudicative action against the District, time is of the essence. Until this information is provided, as well as the statutory authority or power of subpoena of the OSDE to compel these citizens to appear before the State Board, I am advising my clients not to make any appearances before the State Board, including but not limited to your meeting of April 9, 2021.

I am also concerned as to the legality of the March 25, 2021, meeting of the State Board, as well as future meetings of the State Board. Title 25 O.S. §307.1(C)(1) provides that "a public body may hold meetings by videoconference *where each member of the public body is visible and audible to each other and the public, . . .*". Further, I am very disturbed as to the legal justification of conducting an executive session regarding the business of the District. The agenda of the meeting justified an executive session pursuant to Title 25 O.S. §307(B)(4) and (7), which provide as follows:

"B. Executive sessions of public bodies will be permitted only for the purpose of:

4. Confidential communications between a public body and its attorney

concerning a pending investigation, claim, or action if the public body, with the advice of its attorney, determines that ***disclosure will seriously impair the ability of the public body to process the claim or conduct a pending investigation, litigation, or proceeding*** in the public interest;

7. Discussing any matter where **disclosure of information would violate confidentiality requirements of state or federal law;**"

I have reviewed the eight (8) areas of concern that the Board discussed in executive session and cannot find any issue or subject matter that would meet the statutory justification for an executive session. Certainly, it does not appear that the Board discussed or disclosed individual student records or confidential employment records. Rather, it appears that based on the motion asserted after the executive session, that the State Board just preferred to conduct the proceeding in a "star chamber" secret meeting.

Please provide the specific factual justification for the Board's decision to conduct this state business in secret. Failure to do so will result in the filing of a police report and referral to the Oklahoma County District Attorney, as well as the filing of an action in District Court to make the executive session ("including tape recordings") public. Finally, the OSDE is on notice that future executive sessions which do not statutorily qualify as such will very likely be challenged by the District, and you should preserve all recordings and documentation regarding those meetings.

As to any future meetings regarding the potential loss of accreditation, the District requests that they be conducted as an individual proceeding pursuant to the Oklahoma Administrative Procedures Act, Title 75 O.S. §250 *et seq.* In addition, please advise if the members of the State Board intend to preside over or decide any issues regarding the District after the State Board unanimously *pre-decided* that "the District failed to comply with Oklahoma laws and regulations", before the District or its employees and Board members were even advised of the charges. It is my understanding that you took that formal action even after one of your own State Board members correctly pointed out that you were 'getting the cart before the horse' so to speak.

With respect to the State Board's implied directive (received by email on March 30, 2021) for the District to "open its doors and provide an option for on-site instructional delivery to its students", "no later than April 1, 2021, there are several concerns¹. First, the hallmark of Oklahoma's educational system is local board control. The OSDE has no more

¹ You indicated in your letter that Western Heights is "the only accredited public school in the state to not offer an in-person option to students". While the OSDE has much greater access to information than I, based on the news this morning that Putnam City is restarting school only **today**, it appears that your assertion, as of the date of your letter, may have been inaccurate.

authority to order the District to return to the classroom, any more than former President Trump had the authority to order the State Board to return the children to school on a statewide basis several months ago. The District takes its responsibility to protect its teachers and students very seriously. Safe return to school is a subjective decision which has been highly influenced over the last year by political and economic considerations, neither of which are pertinent to consider at the local level. Just this week Rochele Walensky, the new Director of the CDC was quoted as saying "I am very scared", when referring to the current resurgence of COVID and its variants. Just yesterday on *Meet the Press*, Dr. Michael Osterholm, a nationally recognized infectious disease expert who supported the cautious return to school based learning several months ago, appeared to reverse his position. Dr. Osterholm indicated that his earlier position was based on the evidence (then) that COVID was not readily transmittable to children, so in-school learning appeared somewhat safe. However, yesterday Dr. Osterholm discussed the new B117 variant of the virus, which is rapidly spreading in the United States due to it being "50-100% more infectious" than the base strain, **and which "infects kids very readily"**, and indicated that these new scientific developments have caused him to reconsider his earlier position about kids in school. Dr. Anthony Fauci was also quoted in the same news program that "we need to take a step back", when referring to the current situation.

In any event, as you are aware, this a prospective decision of the Board, not the Superintendent. This issue is on the Board's agenda for its April 12th meeting; I will advise you of any decisions made at that time. Suffice it to say this is a critical decision that should be based on the science, which sometimes changes daily. What it should not be based upon is politics or the economy, or even the opinions of the political appointees on the State Board. Certainly, the District respects the opinion of the State Board and its members and will carefully consider those opinions along with the much more pertinent scientific opinions, when and if the issue is properly before the Board of Education. Finally, telling the District on Wednesday, March 30, 2021, to start school on Friday, April 1, 2021, would seem to invite the District to violate the Open Meetings Act, Title 25 O.S. §301 *et seq.* It also doesn't take into account the actual mechanics of re-opening school and making sure the teachers and staff are in attendance when the students show up.

As previously stated, the District wishes to fully cooperate in providing information and assurances that they are operating the District lawfully and appropriately. However, the District will not be selectively prosecuted without cause, or for the wrong reasons. The OSDE has a history of this type of inappropriate conduct going all the way back to 2005, when after Western Heights leadership criticized the Department publically, the Department placed several of their schools on the School Improvement List. Western Heights appealed that determination and your own hearing officer held that the Department's decision to place Western Heights on the List **was not based on facts and was "arbitrary and capricious"**. Of course, you are also well aware that the Department shorted Western Heights close to twenty million dollars (\$20,000,000.00) in funding over

the last several decades, which the District has had to resort to the courts to rectify. If that weren't bad enough, the District, along with all the other litigating school districts, reached an agreement with the OSDE to settle the funding lawsuit, which settlement this very same State Board voted to renege upon. Those funds could have gone a long way to benefit our high poverty students that you referred to in your letter.

If that were not enough, the District believes that selective prosecution is also shown by the OSDE auditing the District's federal programs two years in a row, which failed to show any significant issues last year, and showed no issues this year. Future discovery will show whether that was just a coincidence or was a coordinated effort to mistreat Western Heights. Finally, disparate treatment may also be indicated by the fact that Western Heights was passed over for incentive grant funding for Title I schools, which as you pointed out, the District qualified for based on its high poverty rate. The needed funds were apparently awarded to "rich" districts who have much lower poverty rates.

In summary, the Department has given Western Heights no reason to trust its motives or actions on any issue. Whether their suspicions of retaliation are true will likely only be revealed in court ordered and/or Title 75 discovery in the event the Department continues to threaten and intimidate the District to the point that it must file suit to protect itself in court.

I look forward to receiving the information and documents requested. If you have any questions or comments, feel free to call.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jerry Colclazier", with a long horizontal flourish extending to the right.

Jerry Colclazier

cc: Mannix Barnes
Members of the Board of Education
Members of the State Board